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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

JOHN R. BARRIE,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Defendant and Respondent.

C085175

(Super. Ct. No. CU13079359)

Under Code of Civil Procedure¹ section 657, a trial court may grant a motion for a new trial on seven distinct grounds. The statute requires the trial court to specify in writing the ground or grounds upon which the motion is granted and the reason or reasons for granting the motion upon each ground stated.

¹ All further section references are to the Code of Civil Procedure unless otherwise specified.

Where a defendant makes a motion for a new trial solely on the ground that the jury awarded excessive damages in light of the evidence presented at trial and the trial court grants the motion but fails to strictly comply with section 657's written specification of the reasons requirement, a harsh result follows -- that is, the new trial order must be reversed, automatically reinstating the original judgment. That is the result here.

FACTUAL AND PROCEDURAL BACKGROUND

We dispense with a detailed recitation of the facts because it is unnecessary to the issue on appeal. For context, however, we provide the following brief description of the action.

Plaintiff John R. Barrie suffers from a disability diagnosed as allergic rhinitis, which causes extreme allergic sensitivities and reactions to multiple chemicals. He informed his supervisor of his disability when he was hired, and defendant the Department of Transportation (Department) accommodated his disability during the first five years of his employment. After Barrie started reporting to a new supervisor, he suffered repeated exposures to chemicals and violations of his reasonable accommodation request, and experienced hostility and retaliation at work.

Barrie made numerous written and verbal complaints. During a meeting following one such complaint, Barrie "endured over three hours of verbal [tirades], bullying and harassment" by a supervisor and was stripped of certain job duties that resulted in a reduction of income. Barrie "left this meeting in shock and feeling emotionally debilitated. [He] left for the remainder of the day and immediately went out on 15-day stress leave." Following his return to work, Barrie continued to experience harassment, hostility, and retaliation. Although "the overt, assaultive behavior against [Barrie] stopped," the Department's conduct "shifted to more physical assaults such as exposure to perfume."

Barrie sued the Department asserting the following causes of action: (1) hostile work environment, harassment based on disability; (2) disability discrimination; (3) failure to engage in timely and good faith interactive process; (4) failure to accommodate disability; (5) retaliation; (6) failure to prevent discrimination/harassment and retaliation; (7) whistleblower retaliation; (8) defamation; and (9) loss of consortium.

A jury found in favor of Barrie for, among other things, unlawful discrimination and harassment, and awarded him \$44,413 in economic damages for past lost earnings and \$3 million in noneconomic damages for past emotional distress.

The Department filed a motion for a new trial pursuant to section 657 arguing the “verdict award for special and general damages [wa]s excessive given the evidence in this jury trial.” Specifically, the Department said: “The special damages for ‘Past Economic Loss Lost Earnings’ of \$44,413.00 for winter [timekeeping] duties that were not performed by [Barrie], nor authorized to be performed by [Barrie], and the ‘non-economic damages for past emotional distress’ of \$3 million show that this verdict was the product of something other than due deliberation over the evidence and law and the amount of the award strongly suggests the jury was inflamed by passion and prejudice.” The Department requested a remittitur² and acknowledged that such a remedy is “confined to cases in which the only jury error was an excessive damages award.” If

² Trial courts may condition orders for a new trial on additur or remittitur, meaning “that such orders shall be made unless the affected party consents to the addition to or reduction ‘of so much [of the verdict] as the court *in its independent judgment determines from the evidence to be fair and reasonable.*’ ” (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 933; § 622.5.) Section 662.5, subdivision (a)(2) provides: “In any civil action where after trial by jury an order granting a new trial limited to the issue of damages would be proper, the trial court may in its discretion: [¶] . . . [¶] [i]f the ground for granting a new trial is excessive damages, issue a conditional order granting the new trial unless the party in whose favor the verdict has been rendered consents to the reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable.”

Barrie did not accept the reduced damages amount specified in the order, the Department asked “for a limited new trial - i.e., a new trial limited to the issues of damages (findings re liability, etc. to be kept intact).”

The final order was signed and filed on July 6, 2017, and states:

“Defendant’s Motion for New Trial limited to the issue of damages is granted. However, this is a conditional order. If Plaintiff consents to the reduction of non-economic damages to \$350,000, then the request for a new trial is denied. . . . The deadline for acceptance or rejection of the reduction of damages is July 28, 2017. Failure to respond to this order shall be deemed a rejection and a new trial limited to the issue of damages shall be granted automatically.

“Legal Authority

“ ‘A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.’ [Citation.] [¶] ‘The remittitur is a judicially developed device, codified in Code of Civil Procedure section 662.5, to allow trial judges who disagree with a jury’s determination of damages to order a conditional new trial unless the plaintiff agrees to a reduced damage award.’ [Citation.] [¶] ‘[T]he procedural device of remittitur is to be utilized only when a new trial is warranted solely on the grounds of excessive damages.’ [Citation.]

“Analysis

“In the present case, through testimony at trial, the described workplace harassment occurred over the course of seven years. [Barrie’s] treating therapist, Dr. Norsell, diagnosed [Barrie] with [post-traumatic stress disorder] and [Barrie]

described visiting an emergency room due to a reaction to paint fumes and there were other events associated with direct and indirect harassment over the years.

“The jury found that [Barrie] suffered \$44,000 in economic damages. The jury then found non-economic damages in the amount of \$3,000,000.

“ ‘A reviewing court must uphold an award of damages whenever possible and all presumptions are in favor of the judgment.’ ‘With respect to a claim that compensatory damages are excessive, “[we] have recognized that while the jury is entrusted with vast discretion in determining the amount of damages to be awarded,” . . . where the recovery is so grossly disproportionate as to raise the presumption that it is a result of passion or prejudice, the duty is then imposed upon the reviewing court to act.’ [Citation.]

“Here, the Court, after reviewing the record, weighing the evidence, and accepting reasonable inferences from the evidence presented, finds that the jury should have reached a different decision as to the non-economic damages. The Court finds that the \$3 million dollar award for past non-economic damages is ‘ . . . so excessive as to indicate that it was prompted by passion, prejudice, whim or caprice.’ [Citations.] [¶] Therefore, based upon the evidence submitted at trial, the Court determines that \$350,000.00 is fair and reasonable compensation.”

Barrie filed his notice of appeal on July 24, 2017, four days before the deadline to reject or accept the reduction in damages.

DISCUSSION

Barrie challenges the trial court’s new trial order above solely on procedural grounds, i.e., that the trial court failed to state reasons sufficient to comply with section 657, requiring reversal. We independently review the order for compliance with the statutory requirements. (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 628.)

I

Statutory Requirements

“The authority of a trial court in this state to grant a new trial is established and circumscribed by statute. [Citation.] Section 657 sets out seven grounds for such a motion: (1) ‘Irregularity in the proceedings’; (2) ‘Misconduct of the jury’; (3) ‘Accident or surprise’; (4) ‘Newly discovered evidence’; (5) ‘Excessive or inadequate damages’; (6) ‘Insufficiency of the evidence’; and (7) ‘Error in law.’ ” (*Oakland Raiders v. National Football League, supra*, 41 Cal.4th at p. 633.) “When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court’s reason or reasons for granting the new trial upon each ground stated.” (§ 657.)

The words “ground” and “reason” have different meanings. (*Mercer v. Perez* (1968) 68 Cal.2d 104, 112.) “The word ‘ground’ refers to any of the seven grounds listed in section 657. [Citation.] A statement of grounds that reasonably approximates the statutory language is sufficient. [Citations.] The statement of ‘reasons,’ on the other hand, should be specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation.” (*Oakland Raiders v. National Football League, supra*, 41 Cal.4th at p. 634.) “ ‘[T]he trial judge is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses,’ nor need he [or she] undertake ‘a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment[.]’ ” but the “trial judge [is required] to briefly identify the deficiencies he [or she] finds in ‘the evidence’ or ‘the record’ or [citation] ‘the proof’ -- rather than merely in ‘the issues’ or ‘the ultimate facts.’ ” (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d

359, 370, 367.) The “appellate court cannot remand the case to permit the trial court to correct an insufficient statement of reasons.” (*Oakland Raiders*, at p. 635.)

While “California courts have consistently required strict compliance with section 657” (*Oakland Raiders v. National Football League*, *supra*, 41 Cal.4th at p. 634), “[t]he failure to supply an adequate specification of reasons renders the new trial order defective, but not void” (*Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, 550). On appeal, the new trial order “shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, *except* [on the grounds of insufficiency of the evidence or inadequate or excessive damages].” (§ 657, italics added; *Oakland Raiders*, at p. 636.) Thus, where an order is based solely on insufficiency of the evidence or excessive damages and fails to state reasons sufficient under section 657, and no other grounds are stated in the motion, the order must be reversed, and the judgment automatically reinstated. (*La Manna v. Stewart* (1975) 13 Cal.3d 413, 425; *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 63.) Such grounds are treated differently because section 657 provides “it shall be conclusively presumed that said order as to such ground was made *only* for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground *only* if there is no substantial basis in the record for any of such reasons.” (§ 657, italics added.)

Although “[t]he courts’ strict interpretation of section 657 has been criticized as creating ‘a “procedural minefield” for trial judges who issue new trial orders’ ” that may result in “unfairness to the successful moving party when the trial court’s failure to file an adequate statement of reasons renders the order defective[,]” it nonetheless furthers the will and intent of the Legislature. (*Oakland Raiders v. National Football League*, *supra*, 41 Cal.4th at p. 635.) “ ‘ “The power of the legislature [in] specifying procedural steps for new trials is exclusive and unlimited. [Citations.] The wisdom of or necessity for

certain requirements are matters for legislative and not judicial consideration” ’ ”
(*Ibid.*)

II

The New Trial Order Does Not Comply With Section 657

The sole ground for the new trial order in this case was excessive damages. It was the only ground discussed in the order and the procedural device employed -- a remittitur -- may *only* be used when the ground for the new trial order is excessive damages.

(*Thompson v. Friendly Hills Regional Medical Center, supra*, 71 Cal.App.4th at p. 548; § 662.5.) We note that, “an order granting a new trial on the grounds of excessiveness of damages automatically covers that aspect of the sufficiency of the evidence” as well. (*Dell’Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 549; see *Kent v. Los Angeles Ry. Corp.* (1938) 29 Cal.App.2d 435, 436-437 [an order granting a new trial for excessive damages “ ‘ “implies that the motion was granted upon a consideration of the insufficiency of the evidence to support the verdict” ’ ”].)

The new trial order does not, however, set forth a statement of reasons as required under section 657. The order contains a brief statement of the facts introduced at trial: “In the present case, through testimony at trial, the described workplace harassment occurred over the course of seven years. Plaintiff’s treating therapist, Dr. Norsell, diagnosed Plaintiff with [post-traumatic stress disorder] and Plaintiff described visiting an emergency room due to a reaction to paint fumes and there were other events associated with direct and indirect harassment over the years.” The order next contains a discussion of the legal standard for determining whether an award of damages is excessive, and concludes with: “Here, the Court, after reviewing the record, weighing the evidence, and accepting reasonable inferences from the evidence presented, finds that the jury should have reached a different decision as to the non-economic damages. The Court finds that the \$3 million dollar award for past non-economic damages is ‘ . . . so excessive as to indicate that it was prompted by passion, prejudice, whim or caprice.’

[Citations.] [¶] Therefore, based upon the evidence submitted at trial, the Court determines that \$350,000.00 is fair and reasonable compensation.”

As in *Stevens*, the new trial order “does not indicate the respects in which the evidence dictated a less sizable verdict, and fails even to hint at any portion of the record that would tend to support the judge’s ruling. Certainly the statement that the amount of the verdict was ‘based upon prejudice and passion on the part of the jury’ is not a ‘reason’ that provides an insight into the record.” (*Stevens v. Parke, Davis & Co., supra*, 9 Cal.3d at p. 62; see also *Miller v. Los Angeles Flood Control Dist.* (1973) 8 Cal.3d 689, 696, 698-699 [insufficient statement of reasons given under § 657 in new trial order on ground of insufficiency of the evidence to justify the verdict].) The trial court neither discussed nor identified *how* the therapist’s diagnosis or the “events associated with direct and indirect harassment over the years” impacted its finding of excessive damages. The trial court also did not explain *why* “the jury should have reached a different decision as to the non-economic damages” or *how* the evidence led the trial court to that conclusion. (Cf. *Sandoval v. Qualcomm, Inc.* (2018) 28 Cal.App.5th 381, 421-422 [sufficient reasons given in new trial order]; *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1690, 1695-1696 [adequate specification of reasons in new trial order based on excessive damages ground].)

“[W]e simply cannot identify the respects in which the trial court found plaintiff’s evidence to be insufficient.” (*McLaughlin v. City etc. of San Francisco* (1968) 264 Cal.App.2d 310, 316.) We are left to speculate as to the trial court’s reasons, which is precisely the concern section 657 sought to ameliorate. (*Id.* at p. 317 [“the 1965 amendment of section 657 was designed to put an end to speculation of this nature, and we are not permitted to infer the trial court’s reasons where we have not been told what they are”].)

In its brief, the Department attempts to read a statement of reasons into the order by detailing various arguments from its new trial motion that seemingly support the

remittitur, arguing “[t]he order states that the trial court reviewed the record” and the trial court must have therefore agreed with the arguments raised in the Department’s motion. We decline to draw on the Department’s arguments in the new trial motion to create or formulate the statement of reasons absent in the new trial order; as our Supreme Court said, “a careful reading of section 657 leaves no room for doubt that the reasons required to be specified by that section must be contained either in the order granting a new trial or in a separately prepared and signed statement in writing filed with the clerk within 10 days after the filing of the order.” (*Stevens v. Parke, Davis & Co., supra*, 9 Cal.3d at p. 62.)³

“The new trial order in this case was based solely upon the ground of excessive damages. Since ‘it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specifications of reasons’ [citation], and no reasons were specified, the order granting a new trial cannot be sustained upon this ground.” (*Stevens v. Parke, Davis & Co., supra*, 9 Cal.3d at p. 63; see *La Manna v. Stewart, supra*, 13 Cal.3d at p. 425 [new trial order based on insufficiency of the evidence reversed and judgment automatically reinstated because no reasons stated in the order].) Because the Department’s motion sets forth no other ground upon which the order can be sustained, the order must be reversed.⁴ It follows that the judgment will be automatically reinstated. (*Stevens*, at p. 63.)

³ The trial court did not file a separate writing within 10 days of filing the new trial order.

⁴ The Department claims the new trial order should be affirmed because the \$2,650,000 differential between the \$3 million jury award and the \$350,000 remittitur constitutes noncompensatory damages in violation of Government Code section 818, which is against law, “one of the bases of the State’s motion at the trial court.” The Department provides no record citation to support this statement and our review of the Department’s motion reveals no “error in law” ground or argument in the new trial

DISPOSITION

The order granting a new trial is reversed. The case is remanded to the trial court with directions to reinstate the judgment in favor of Barrie and against the Department in the amount of \$3,044,413. Barrie shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

/s/
Robie, Acting P. J.

We concur:

/s/
Murray, J.

/s/
Hoch, J.

motion; the Department relied exclusively on excessive damages and insufficient evidence to justify the damages award.